STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, V ALVIN C. WALKER, JR., Defendant-Appellant.	FOR PUBLICATION March 24, 2005 9:00 a.m. No. 250006 Oakland Circuit Court LC No. 2002-187306-FH Official Reported Version

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

NEFF, P.J.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82; possession of a firearm by a felon, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of two to eight years for the felonious assault conviction and thirty-five months to ten years for the conviction of possession of a firearm by a felon, and to two consecutive prison terms of two years for the felony-firearm convictions. We affirm.

I

This case stems from a domestic assault in which defendant beat his live-in girlfriend repeatedly with a stick and threatened her with a gun. The couple had been living together for several years and had a son together. The victim told police that after the couple had an argument on the evening of October 18, 2002, defendant forced her to lie on the bed on her stomach while he beat her with white sticks on her back, buttocks, legs, and arms. He then pointed a handgun at her and told her he would "blow her back out" if she moved. The beatings continued until early the next morning. The victim escaped at approximately 9:00 a.m. by jumping from a second-story balcony while defendant was sleeping. She ran to the home of a neighbor, who called 911.

The police arrived within a few minutes. Because the victim was upset, the neighbor wrote out her statement of what happened. The victim accompanied the police to the couple's

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home, where the police found three white sticks and a handgun. Defendant was not at the home, but was located and arrested a short while later.

II

Defendant first argues that he was denied his right of due process and the right to confront witnesses by the admission of the victim's hearsay statements. Defendant contends that the trial court erred by admitting the statements under MRE 803(2), the hearsay exception for excited utterances.

The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002); *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id*.

A

Defendant argues that the admission of the victim's statements as excited utterances was improper because the statements were not made before the victim had the time and capacity to fabricate the statements. He argues that there was a two-hour delay from the time of the assault to the time of the statements, the victim fell asleep between the assault and her escape, and she had time to compose herself enough to jump from a second-story window, all of which support a conclusion that she had the capacity to fabricate the assault.

The prosecutor filed a pretrial motion to admit the victim's statements to the neighbor under MRE 803(2). The record indicates that following a hearing, the trial court granted the motion. We find no error in the admission of the victim's statements.

Under MRE 803(2), a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." There are two primary requirements for an excited utterance: (1) there must be a startling event, and (2) the resulting statement must have been made while the declarant was under the excitement caused by that event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

There is no express time limit for excited utterances. The rule focuses on the lack of capacity to fabricate, not the lack of time to fabricate. Although the amount of time that passes between the event and the statement is an important factor in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. The question is not strictly one of time, but of the possibility of conscious reflection. *Id*. at 551. The trial court's decision regarding whether the declarant was still under the stress of the event is given wide discretion. *Id*. at 552.

B

Here, all the circumstances support a finding that the victim's statements were the result of a startling event and constituted an excited utterance. According to the evidence, the victim was beaten throughout the night and escaped within two hours of the last beating. She jumped from a second-story balcony, ran to a neighbor's house, and asked her to call 911. According to the neighbor, the victim was injured and "crying and shaking and she seemed really upset, hurt." The 911 call was received at 9:02 a.m. and the first police officer arrived at the neighbor's home within five minutes; other officers arrived within fifteen to twenty minutes. According to the officers' testimony, the victim was hysterical: she was scared, crying, highly upset, and shaking. There is nothing to suggest that the intervals between the assault, her escape, and the statements to the neighbor and the police gave rise to reflective fabrication. Accordingly, the determination was within the bounds of discretion, and the trial court properly admitted this testimony into evidence under MRE 803(2). *Smith, supra* at 550.

C

In response to our dissenting colleague, we first note that defendant's challenge in the trial court to the victim's statements was based on his contention that the facts did not support admission of the victim's statement to her neighbor under the hearsay exception for an excited utterance, MRE 803(2). His challenge based on the Confrontation Clause[1] is raised for the first time on appeal. Accordingly, it is arguable whether the issue raised and discussed by the dissent pursuant to *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *United States v Cromer*, 389 F3d 662 (CA 6, 2004), is preserved for appellate review.[2] Nevertheless, we are unpersuaded that either *Crawford* or *Cromer* compels the result for which the dissent argues.

Crawford

The dissent concludes that the victim's statements were inadmissible because they constitute testimonial hearsay under *Crawford*. The *Crawford* Court avoided any attempt to define "testimonial," admittedly creating interim uncertainty concerning the reach of its holding, *Crawford, supra* at 68 n 10, and essentially leaving the lower courts to decide whether particular hearsay evidence is or is not "testimonial." We conclude that the statements of the victim in this case do not qualify as testimonial under the analysis and guidance of *Crawford.*

In *Crawford,* the Court declined to set forth a "precise articulation" of what constitutes "testimonial" hearsay for purposes of the Confrontation Clause, despite acknowledging various

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[1] US Const, Am VI.

[2] As an unpreserved issue, defendant's challenge is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

formulations of a definition. *Id*. at 52. The bar imposed on testimonial hearsay is therefore unsupported by any explicit rule beyond (1) the Court's pronouncements that "*ex parte* testimony at a preliminary hearing" and "[s]tatements taken by police officers in the course of interrogations" are indisputably testimonial, *id*., and (2) the Court's concluding summary:

> Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Cause was directed. [*Id*. at 68.]

Even then, the opinion acknowledges that the term "interrogation" is open to definition. *Id*. at 53 n 4.

Although statements to authorities routinely fall within the category of statements made for the purpose of the investigation of a crime and the "production of testimony with an eye toward trial," *id*. at 56 n 7, that is not always the case. And it does not accurately characterize the majority of the statements in this case.[3] This case involved a domestic assault and, as is not uncommon in these cases, the complainant-victim was not available to testify against her assailant-boyfriend. The victim's statements were initially made to a disinterested female neighbor. The statements to the neighbor were spontaneous and could as justifiably be characterized as a plea for safety and protection as statements made for the investigation of a crime. It is unlikely that someone would jump from a second-story balcony and run to the home of a neighbor she did not know, all with an eye toward developing testimony for subsequent prosecution.

Justice Scalia's majority opinion in *Crawford* acknowledges that the language of the Confrontation Clause alone does not answer the question posed. *Id*. at 42-43. He engages in a lengthy discussion of the history of the right to confront one's accusers in support of his interpretation of the Confrontation Clause. Given the historical perspective of *Crawford*, and its recognition that "[p]olice interrogations bear a striking resemblance to examinations by justices of the peace in England," *id*. at 52, we cannot conclude that the victim's spontaneous statements in this case are akin to the testimonial hearsay barred by *Crawford*. In our view, *Crawford* is confined to the type of testimonial hearsay addressed by that case. We discern no holding or analysis in *Crawford* that would lead us to conclude that the victim's statements to her neighbor, and the repetition of her statements to responding police officers, were testimonial hearsay violative of the Confrontation Clause. Because her statements were nontestimonial hearsay, "it is wholly consistent with the Framers' design to afford the States flexibility in their development

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[3] Defendant challenges the victim's statements generally and does not distinguish between her oral statements made to the neighbor, her written statement to the neighbor, and her subsequent statements to the police in the process of their investigation.

of hearsay law . . . ." *Id.* at 68. Michigan has well-developed hearsay law that provides a clear exception for excited utterances, and the victim's statements fit within the exception.

Cromer

We also find the decision in *Cromer* unpersuasive within the context of this case. The narrow issue in *Cromer* was "whether the statements of a confidential informant to police are 'testimonial' in nature." *Cromer, supra* at 672. That issue is hardly comparable to the situation here involving the excited utterances of a victim of a violent crime who made statements to a neighbor and to police officers within hours of having been beaten and within moments of fleeing from her home by jumping off a second-story balcony.

Notwithstanding that *Cromer*'s facts and legal issue make that case distinguishable from this one, we are not prepared to extend the application of the expansive definition of testimonial hearsay adopted there to the excited utterance exception to the hearsay rule here. The *Cromer* opinion concludes, essentially, that *Crawford* eviscerates evidentiary rules governing the admission of hearsay statements except in the limited circumstance in which the wrongful conduct of the defendant is responsible for the inability to confront the witness, thus resulting in a forfeiture of the right to confrontation. See *id.* at 679. We do not read *Crawford* as establishing such a broad principle. As noted by the dissent, *post* at ___ n 14, we are not bound by decisions of lower federal courts, and we are not inclined to rely on *Cromer* to rewrite the rules of evidence.

The *Crawford* Court was careful not to dictate the contours of the Confrontation Clause bar to testimonial hearsay and refrained from undertaking a sweeping analysis of various factual predicates. The unusual circumstances of this case bear out the wisdom of the Court's restraint and the danger of preconceived blanket classifications beyond those provided by the Court.

The discussion in *Cromer,* relied on by the dissent, is precisely the type of sweeping analysis the *Crawford* Court declined to "indulge in." While Justice Scalia cited and relied on an article by Friedman,[4] *Crawford, supra* at 61, the *Crawford* opinion did not adopt the suggested broader framework and "rules of thumb" from the Friedman article that the *Cromer* Court readily incorporated into its analysis, *Cromer, supra* at 673. There was no greater justification in *Cromer* for such a sweeping analysis than existed in *Crawford,* and therefore the *Cromer* mandates are hardly persuasive authority for interpreting the *Crawford* Court's view of testimonial hearsay.

Although the United States courts of appeals have struggled with the definition of "testimonial hearsay" following the decision in *Crawford*, *United States v Hendricks*, 395 F3d 173, 180 (CA 3, 2005), their holdings leave no doubt that the expansive view of testimonial

[4] Friedman, *Confrontation: The search for basic principles*, 86 Geo L J 1011 (1998).

hearsay adopted in *Cromer* is not universal. We find the restraint exercised by these courts in keeping with the tenor of *Crawford.*

In *Leavitt v Arave*, 383 F3d 809, 830 (CA 9, 2004), the court found no violation of the Confrontation Clause by the admission of a murder victim's statements to the police regarding her suspicions and the identity of a prowler the night before her death. The court noted that the victim had

> been severely frightened on the night before her death by a prowler, who tried to break into her home. In a great state of agitation, she called the police and spoke to dispatchers and to police officers. Among other things, she said that she thought the prowler was Leavitt, because he had tried to talk himself into her home earlier that day, but she had refused him entry. [*Id*.]

In addressing the recent holding in *Crawford*, and the examples given there of testimonial hearsay, the court noted:

> We do not think that Elg's statements to the police she called to her home fall within the compass of these examples. Elg, not the police, initiated their interaction. She was in no way being interrogated by them but instead sought their help in ending a frightening intrusion into her home. Thus, we do not believe that the admission of her hearsay statements against Leavitt implicate "the principal evil at which the Confrontation Clause was directed[:] . . . the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." [*Leavitt, supra* at 830 n 22, quoting *Crawford, supra* at 50.]

Similarly, while acknowledging that the discussion was dictum, the Court in *Mungo v Duncan*, 393 F3d 327, 336 n 9 (CA 2, 2004), offered an analysis of various statements at issue under *Crawford*:

> Although the word "interrogation" can include any asking of questions, the first meaning listed (for "interrogate") in *Webster's Third New International Dictionary* is "to question typically with formality, command, and thoroughness for full information and circumstantial detail." *Webster's Third New International Dictionary* 1182 (1976). We believe the Supreme Court intended this more limited meaning, which is more consistent with the other types of testimonial statements the Court mentioned.
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> Several statements made by Arthur to the police were admitted at Mungo's trial. The first group were the responses to a series of investigatory and hot-pursuit questions, including whether "[t]hose guys running" were the ones who shot Arthur, whether Arthur knew where they were going, and, upon overtaking them, whether they were the shooters. Again after Mungo and Stewart had been

> taken into custody, the police asked Arthur as to each whether this was the person who had shot him. When Arthur answered yes as to each of the two, Officer Cavallo pressed for clarification, "I need to know exactly who shot you," to which Arthur responded, "The guy in gray [Mungo]," and explained, "They tried to rob me."
>
> As for the answers to the early questions, delivered in emergency circumstances to help the police nab Arthur's assailants, we doubt that these were of the type of declarations the Court would regard as testimonial. As for the final statement, however, made after Mungo and Stewart had been caught, and after Arthur had confirmed that they were the men who shot him, specifically that it was Mungo who shot the gun and that the motive was robbery, this statement seems to have been made in greater formality with a view to creating a record and proving charges. It seems more likely to fall within the category the Court described as testimonial.
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> *The Supreme Court declined to attempt any precise definition of "testimonial," wisely sensing that the issue was complex and that the exact rule should gradually emerge in light of cumulative experience.* We offer these reflections in the hope that they may assist courts to work gradually, case by case, toward a functional understanding of the term. [Emphasis added.]

The sweeping analysis in *Cromer* is also not without conflict at the federal district court level. See, e.g., *United States v Savoca*, 335 F Supp 2d 385, 392-393 (SD NY, 2004):

> Although the *Crawford* Court explicitly stated that the proffered list of "testimonial statements" was not exhaustive, all of the examples provided contain an "official" element. While the statements may or may not have been sworn, each example was made to an authority figure in an authoritarian environment. This element of officiality appears to be the hallmark of a "testimonial statement."

Given these opposing views concerning the interpretation of *Crawford*'s bar on testimonial hearsay, it would be premature, if not erroneous, to adopt the all-encompassing, expansive view set forth in *Cromer* to govern in Michigan. This crucial area of law should be permitted to evolve in accordance the factual circumstances presented, as the *Crawford* Court so wisely envisioned.

III

Defendant argues that he was denied his right to a fair trial by the prosecutor's misconduct in closing argument. Defendant failed to object to the alleged misconduct, and we find no plain error affecting defendant's substantial rights. Absent an objection, defendant must show plain error that affected his substantial rights, i.e., that the error was outcome determinative. *Carines*, *supra* at 763-764; *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). A reviewing court should reverse only if the defendant is actually innocent or

the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 24; *Carines, supra* at 763.

Claims of prosecutorial misconduct are reviewed case by case. *Rodriguez, supra* at 30; *People v Kelly,* 231 Mich App 627, 637; 588 NW2d 480 (1998). A prosecutor is generally given great latitude to argue the evidence and all inferences relating to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor's comments must be judged in the context of the prosecution and defense theories. *Id.* at 283-286; *Rodriguez, supra* at 30.

Defendant argues that the prosecutor appealed to the jury's sympathy in arguing that the reason the victim failed to appear for trial was that she was "scared to death of the defendant." A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

In closing argument, the prosecutor stated:

> By now all of you should know, should have a pretty good understanding of, of why [the victim] was not here at trial. It's patently obvious that she's scared to death of the defendant. She's so scared she endured a year of abuse, a year of abuse with saying nothing, nothing at all. If she's willing to put up with that, she's not willing to come in and face him and accuse him of it.
>
> Please keep this in mind, we don't pick the victim. We don't pick the victims, the defendant does. Defendant picked [the victim] for a reason. He picked [the victim] because he can know that he can count on her failing to appear.
>
> But, [the victim's] failure to appear does not excuse the defendant's actions. This case is not about [the victim]. It's not about what [the victim] did or did not do. It's about Alvin Walker. It's about the defendant. It's about what he did to [the victim].

The prosecutor went on to summarize the evidence of defendant's actions.

In closing argument, defense counsel also addressed the issue of the victim's absence at trial, positing that she was absent because her report of these events was false, and she was afraid of the consequences of recanting her story and having made a false report to the police. In concluding his argument, defense counsel asked that the jury take into consideration that the victim did not show up for trial. Further, defense counsel argued that the prosecutor's suggestion that the victim did not appear because she was scared was not believable, but if the jury believed the prosecutor's reasoning, it should convict defendant.

In rebuttal, the prosecutor responded to defense counsel's argument. The prosecutor stated that there was no motive for the victim to fabricate this story, but the jury should base its decision on the evidence:

> The issue is really not whether she's here or not. I think you're all savvy enough to understand why she's not here.
>
> But, the question before you should be did I produce beyond a reasonable doubt from this witness and the documents and the photographs that the defendant committed this crime.

We find no error requiring reversal. While the prosecutor's argument may be objectionable taken in isolation, considered in context, and in light of defense counsel's argument and theory, we cannot conclude that any objectionable argument unduly prejudiced defendant. *Watson, supra* at 591-592; *Wise, supra* at 104. The victim's potential absence from trial and the possible recantation of her accusations were raised in the prosecutor's opening statement. When the prosecutor again raised these issues in his closing argument, defense counsel had the opportunity to object to argument on this issue, but did not do so. Defense counsel instead used this argument to bolster the defense theory that the victim's allegations were false and that she did not appear for that reason. We cannot conclude that the prosecutor's argument was an improper appeal to the jury's sympathy for the victim that prejudiced defendant to the extent that reversal is required. *Watson, supra* at 591-592. Defendant has not shown that an instruction could not have cured any error. *Id*. at 586; *Rodriguez, supra* at 30. Moreover, the prosecutor emphasized that the jury should base its decision on the evidence, and the court likewise instructed the jury that the attorneys' arguments were not evidence and that the jury should not let sympathy or prejudice influence its decision. *Watson, supra* at 592.

IV

Defendant argues he was denied the effective assistance of counsel by counsel's failure to secure the victim's presence as a witness at trial and by his failure to object to the admission of the hearsay evidence of the written statement taken from the victim by her neighbor. We disagree.

To establish ineffective assistance of counsel, defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma,* 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant must overcome a strong presumption that defense counsel's action constituted sound trial strategy. *Id*. at 302. Because

defendant did not move for a *Ginther*[5] hearing, this Court's review is limited to mistakes apparent on the record. *Rodriguez, supra* at 38.

With regard to securing the victim's presence at trial, defendant has failed to show prejudicial error. *Toma, supra* at 302-303. Although defense counsel sought to have the victim present, the record indicates that neither the prosecution nor the defense could locate her at the time of trial. Defendant has not shown that counsel's performance was deficient in failing to locate a missing witness. Further, as noted previously, defendant used the victim's absence as a matter of trial strategy to bolster his theory that the allegations were false. *Id*. at 302. Finally, as the prosecutor points out, defense counsel could have presented his theory of consent[6] through testimony from defendant; however, defendant failed to show up for the third day of trial, precluding counsel from pursuing this avenue. Given these circumstances, defendant has failed to show that the victim's presence would have resulted in a different outcome.

Because we found no error in the admission of the victim's statements, defendant's claim that counsel was ineffective for failing to object to the victim's written statement must fail. *Rodriguez, supra* at 38. The trial court had ruled on the admissibility of the victim's statements. Counsel is not ineffective for failing to advocate a futile or meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

Gribbs, J., concurred.

/s/ Janet T. Neff
/s/ Roman S. Gribbs

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[5] *People v Ginther*, 390 Mich 436, 443, 212 NW2d 922 (1973).

[6] The defense theorized that the couple engaged in the beatings as sexual activity and that they were consensual.